Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions of the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	

COMMENTS OF CABLE & WIRELESS USA, INC.

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SUMMARY

Cable & Wireless USA is a major provider of both voice and data services throughout the United States. C&W USA serves tens of thousands of retail long distance customers, as well as dozens of resale carriers who buy underlying network services from C&W USA. In addition, the Company provides Internet services to thousands of retail customers and numerous wholesale Internet service providers. As the evolution of the U.S. telecommunications marketplace continues to move rapidly toward convergence, or "one stop shopping," C&W USA and the many other carriers like it must have access to local market entry if they are to continue to thrive and to spur competition and innovation. This proceeding is a critical part of ensuring open entry to local telecommunications markets for all competitors.

Reliance on unbundled network elements is the only practical means by which carriers like C&W USA can achieve early and effective market entry. Resale of existing retail services is not a viable option, for both economic and technical reasons, and construction of local facilities on a nationwide basis is infeasible due to the expense involved and the timeframe within which these carriers must act if they are to keep pace with the marketplace. Thus, the lease of wholesale facilities from existing facilities-based local carriers is the only viable option for many carriers. For many types of facilities and many locations, the only available supplier is the ILEC.

The "Necessary" and "Impair" Standards

The Supreme Court's decision in *AT&T v. Iowa Utilities Board* did not invalidate the list of UNEs previously established by the Commission. Rather, the Court merely stated that the FCC's decision-making process did not fully consider the implications of the "necessary" and "impair" standards of Section 251(d)(2). In particular, the Court was concerned that the

impairment standard was so all-encompassing as to permit even trivial differences to meet the test. C&W USA believes that this issue is easily remedied by the addition of a materiality element to the impairment test. Thus, a carrier would be impaired by an inability to obtain a UNE if its costs were *materially* increased or its service were *materially* delayed or limited in some way. This change satisfies the Supreme Court's concern and preserves the rules previously enacted by the Commission.

C&W USA believes that this standard should be applied to create a minimum set of uniform national standards for UNEs. The telecommunications marketplace is rapidly converging and carriers must raise capital, plan facilities purchase and construction, and design service offerings on a national basis. If a standard set of UNEs is not available throughout the nation, the risks and expenses associated with these variances will significantly decrease the development of competition in telecommunications markets. Certainty and uniformity go hand-in-hand with efficient planning and design and greatly facilitate the raising of capital.

In determining the appropriate set of minimum national UNEs, C&W USA believes that the FCC should view the process from the perspective of a new entrant into the local markets. The Act requires that UNEs be provided to "any requesting carrier," and that standard is best met by considering the minimum set of UNEs that a new entrant might need. This approach also is consistent with the Act's paramount goal of promoting new entry into local telecommunications services.

Minimum UNEs To Be Prescribed

Application of the impairment standard described above, including the standard of materiality, would lead to a conclusion that the original UNEs prescribed by the Commission should be retained. Each of these elements is required by new entrants if they are not to be materially disadvantaged in their entry into local services. In addition, C&W USA submits that this list should be clarified to ensure that both voice and *data* services may be provided by new entrants.

The rapidly emerging marketplace will require all carriers to provide both voice and data services if they are to compete successfully. Thus, the Commission should include local loops on its list of minimum national UNEs, and should clarify that such "loops" include high capacity loops and dark fiber loops. Similarly, the FCC should include integrated digital loop carriers and digital subscriber line access multiplexers, and should clarify that the switching element includes packet switching as well as circuit switching among the UNE list. Finally, it is critical that the Commission recognize and use its authority to require incumbents to provide nondiscriminatory access to combinations of network elements. Competitive use of UNE combinations is crucial to the expeditious development of genuinely competitive, local voice and data markets.

Removal of UNEs

The Commission should preserve for itself the role of determining when prescribed UNEs may be phased out. To cede such power to the states would be to undermine the authority over creation of the list of minimum national UNEs which the Congress placed in the FCC. At the same time, however, the states can serve a valuable function in this process by conducting Section 271-like proceedings when a proposal to phase-out a UNE is made. The state can conduct a proceeding and make a recommendation to the FCC, which may then use that state recommendation in reaching its own determination as to whether a proposed phase-out is justified.

Any standard adopted in connection with the termination of particular UNEs in specific locations should include a reasonable transition time for those companies then relying on that UNE to provide their services. Similarly, where contracts include agreements to provide certain UNEs, those contracts should remain enforceable for their term even when a UNE being provided thereunder is removed from the list of required elements. These provisions are necessary to protect carriers relying on UNEs from the threat of an abrupt end to their underlying service arrangement following a Commission decision to phase-out a UNE in a location.

TABLE OF CONTENTS

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In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions of the	)	CC Docket No. 96-98
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COMMENTS OF CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("C&W USA"), by its attorneys, respectfully submits the following comments on the definition of unbundled network elements ("UNEs") pursuant to Section 251(c) of the 1996 Act.[1]

C&W USA is a major provider of wholesale and retail Internet services, operating one of the largest Internet backbones in the world. C&W USA also is one of the largest long distance carriers in the United States, offering a full range of domestic and international voice, data, and messaging services. As a preeminent Internet services and long distance provider with ongoing plans to integrate and upgrade its networks, C&W USA is intensely interested in the outcome of this proceeding.

INTRODUCTION

C&W USA agrees with Chairman Kennard's statement that the Supreme Court's decision in *AT&T v. Iowa Utilities Board* [2] was a "monumental victory" for the Commission,

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. April 16, 1999) ("*Second FNPRM*").

[2] *AT&T Corp., et al., v. Iowa Utils. Bd., et al.*, 119 S. Ct. 721 (1999) ("*Iowa Utils. Bd.*").

and, ultimately, for consumers of local telephone services throughout the United States.[3] *Iowa Utilities Board* confirmed that the 1996 Act gives the FCC the primary role in ensuring that competition in local markets develops in a rapid and procompetitive manner, [4] and, more specifically, that the Commission has underlying jurisdiction to implement the provisions of Section 251, including authority over such critical issues as the pricing of UNEs.[5] In addition, *Iowa Utilities Board* upheld rules designed to make all three methods of local entry (not just facilities-based provision of service) available, including: (1) the "all elements" rule allowing requesting carriers to create services entirely with ILEC UNEs[6]; (2) the rule prohibiting ILECs from separating combinations of elements[7]; and (3) rules identifying specific ILEC features and functionalities as network elements that must be unbundled.[8]

The Commission's task in this remand is to reexamine its standards for defining UNEs, "taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[9] Notably, as the *Second FNPRM* recognizes, although the Court vacated rule 319, it did not express any criticism of the specific UNEs defined. Rather, because the Court did not perceive, based on the "necessary" and "impair" standards adopted by the FCC,

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3 Statement of FCC Chairman William E. Kennard on Today's Supreme Court Ruling on AT&T Corp. et al. v. Iowa Utilities Board et al., Nos. 97-826 et al., Jan. 25, 1999, <http://www.fcc.gov/speeches/kennard/statements/stwek906.html>.

4 *Iowa Utils. Board*, 119 S. Ct. at 730 ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of [the Communications] Act, which include §§ 251 and 252, added by the Telecommunications Act of 1996") (internal quotations omitted).

5 *See id.* at 729-33.

6 *See id.* at 736.

7 *See id.* at 736-38.

8 *See id.* at 734.

9 *Id.* at 736.

that *any* element would not be subject to the unbundling requirement, it required the FCC to reconsider these standards in order to ensure that the UNEs listed furthered Congressional goals. Significantly, nothing in the *Iowa Utilities Board* decision requires the FCC to reach any specific outcome with regard to the UNEs previously defined, and nothing precludes the agency from mandating the provision of those UNEs it concludes will promote the Act's goal of robust local competition.

In these Comments, C&W USA urges the Commission to lower barriers to local entry and to encourage the provision of integrated telecommunications service packages by adopting a uniform, national list of minimum UNEs to be unbundled throughout the United States. The central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of competition by a multitude of providers -- that is, whether the availability of the UNE is "rationally related to the goals of the Act."[10] Thus, the agency's "necessary" and "impair" standards should be defined in light of principles that will further these goals.

Specifically, C&W USA urges the Commission to conclude that a requesting carrier would be "impaired" by a denial of access to a UNE if use of an externally supplied element, as compared to use of the ILEC's element, exhibits a *material* difference in either cost, time to provision of service, or the number or scope of customers to whom the service would be provided. Similarly, the "necessary" standard, which would apply only in certain limited circumstances, is satisfied if the carrier would experience a *material* loss in functionality as a result of the absence of the proprietary element and if the requesting carrier would be impaired

10 *Iowa Utils. Bd.*, 119 S. Ct. at 734.

(as discussed above) by a lack of access. Unless and until a functioning competitive market for the supply of wholesale network elements develops, neither the "necessary" nor "impair" standard will be met with respect to the features and functionalities integrated into the ILEC network. The mere presence of a single or small number of other providers that are geographically limited or do not provide wholesale services is not sufficient to permit an end to the ILECs' obligation to provide UNEs.

C&W USA submits that application of these standards compels the availability not only of the elements previously identified by the Commission, but also of elements useful for the provision of DSL and other advanced broadband services. It is both inaccurate and unhelpful, however, to divide UNEs into those originally adopted and "additional" UNEs, because it implies that the "additional" UNEs somehow are optional or duplicative. Instead, in analyzing these UNEs, the Commission should organize its approach around the relationship between the various pieces of a comprehensive telecommunications network. Its rules should ensure the availability of those elements most central to a network and on which all other network functionalities depend, such as connectivity (in whatever variety, data or voice) to the customer premises. These elements are at the core of the network "rings" and are the most difficult to replace with external elements. It is only at the outermost "ring" -- add-on or optional functionalities -- that the impairment analysis becomes a closer issue. Theoretically, these elements will, ultimately, be the easiest to replace; today, however, they remain as irreplaceable as the core elements.

Finally, C&W USA is hopeful that, over time, the availability of wholesale alternatives will develop, and that some network elements no longer will need to be unbundled. In order to plan for such an eventuality, the Commission should develop reasonable procedures for removing UNEs from the mandatory list. Although C&W USA agrees that states can play an important advisory role in this process, consistent with the primacy of the FCC's role under the Communications Act the agency itself must make the ultimate decision. To this end, C&W USA recommends that the Commission establish a proceeding on the model of a Section 271 hearing, which includes a formal role for the state commissions to consider removal of UNEs, either on an individual state basis or nationally. Further, C&W USA urges the Commission to adopt reasonable transition rules for any "soon to be retired UNEs" so as not to overturn reliance interests of carrier competitors or disrupt customers served using UNE arrangements.

I. THE COMMISSION SHOULD DEFINE THE "NECESSARY" AND "IMPAIR" STANDARDS CONSISTENT WITH THE ACT'S PURPOSE OF PROMOTING ALL METHODS OF COMPETITIVE ENTRY.

Section 251(d)(2) provides:

> In determining what network elements should be made available for the purposes of subsection (c)(3), the Commission shall consider at a minimum, whether –
>
> (A) access to such network elements as are proprietary in nature is *necessary*; and
>
> (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[11]

The Supreme Court has made clear that these standards must be interpreted so as to further the objectives of the Act. Thus, although the terms "necessary" and "impair" embody some limiting concept, those limitations must be related to the Act's overall purpose of promoting competitive entry and removing barriers to market entry. The Commission must be

[11] 47 U.S.C. § 251(d)(2) (emphasis added).

cognizant of the intended role of Section 251(c) in lowering entry barriers and enabling carriers, as contemplated by the "all elements rule," to provide competing services with minimal, if any, additional initial investment. This preeminent goal of the 1996 Act will be realized only if the Commission ensures access to the critical network elements not currently available as viable options for competitive carriers. C&W USA endorses the UNE rules proposed by CompTel, appended hereto as Attachment A, as reasonable rules intended to promote all methods of competitive entry.

A. UNEs Must Be Available Unless And Until Wholesale Alternatives Are Prevalent.

As the FCC notes in the *Second FNPRM*, the ILEC network is unique because it enjoys economies of density, connectivity, and scale.[12] These advantages are monumental, and, at the present time, they are also insurmountable. Indeed, it is only when the market has developed in such a way as to erode all three of these advantages that access to UNEs is neither likely nor necessary to further the goals embodied in Section 251(c). C&W USA submits that this never will happen unless and until a requesting carrier has multiple wholesale alternatives to the ILEC network.

Sections 251 and 252, in fact, reflect a Congressional effort to catalyze competition by requiring the existing monopoly providers to act as wholesale providers, through the provision of UNEs and of retail services at wholesale rates for resale. When a functioning wholesale market exists, it inevitably will "replace" this statutorily mandated role of the incumbents. Until then, the Act, in effect, requires ILECs to share their economies of density, connectivity, and scale so

[12] *Second FNPRM*, ¶ 27 (quoting *Local Competition First Report and Order*, ¶ 11).

that other carriers can enter the local market. Without a viable, wholesale market, no carrier could begin to compete with the incumbents' monopoly position.

In a fully competitive market, the Act contemplates that carriers seeking to provide service should have at least three effective entry strategies from which to choose: facilities-based deployment, wholesale entry, and service resale. Each entry strategy has different strengths and weaknesses, and therefore each is used for different purposes by different types of carriers, depending on the carrier's goals, the geographic market in which the carrier is operating, and the services the carrier offers.

For providers such as C&W USA, which owns some facilities throughout the United States, wholesale entry is an essential means of enhancing service offerings in existing markets and expanding into new geographic areas. Unlike expansion through facilities-based deployment, which is capital intensive at best, wholesale entry requires a much less substantial initial monetary investment. By enabling new entrants to purchase underlying facilities or capacity from existing providers and use that capacity to provide their own services, wholesale entry removes barriers to the provision of service, and allows carriers to gradually, and therefore efficiently, increase their customer base and traffic volumes over time. While wholesale entry can be used by new entrants -- those new to the industry entirely, those new to a particular geographic market, or those (relatively) new to a particular service market, like C&W USA -- it also is an effective and efficient technique for value-added providers who offer new or more effective ways of using existing infrastructure or technology. Such providers typically have an innovative product or technology which, when used with existing capabilities, produces greater benefits for customers. Value-added providers have no need to duplicate existing infrastructure, often cannot afford to, and, further, often are less skilled at doing so than are the incumbents.

Importantly, even as the level of competition increases in an area, wholesale entry remains an option, and in fact, becomes even more prevalent as additional facilities-based providers offer wholesale services.

The central goal of the 1996 Act is to make these three options -- facilities-based, wholesale, and resale service provision -- available to competitive providers of local telecommunications services.[13] Significantly, the Act "neither implicitly nor explicitly expresses a preference for one particular entry strategy."[14] Instead, the goal is to eliminate *all* barriers to entry, whether financial or technological, in order to maximize the potential competitive benefits to consumers. In short, the principal goal of the Act -- and therefore, the Commission's primary obligation in implementing the Act -- "is to ensure that *all* pro-competitive entry strategies may be explored."[15]

The Act compels incumbents to operate as wholesale providers *because they are the only carriers currently in a position to do so*. As noted, the ILEC networks enjoy economies of density, connectivity, and scale that cannot be duplicated by competitors, now or in the foreseeable future.[16] It is beyond dispute that incumbent LECs are "one of the last monopoly bottleneck strongholds in telecommunications."[17] In order for wholesale entry to be available, therefore, the incumbents must be compelled to provide unbundled network elements to

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13 *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

14 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 12 (1996) ("*Local Competition First Report and Order*").

15 *Local Competition First Report and Order*, ¶ 12.

16 *See Second FNPRM*, ¶ 27 (citing *Local Competition First Report and Order*, ¶ 11).

17 *Local Competition First Report and Order*, ¶ 4.

competitors.

The wholesale obligations of Section 251(c)(3) will remain essential to the creation and maintenance of local competition until a competitive wholesale market develops. In other words, as long as an ILEC's network continues to enjoy economies of density, connectivity, and scale -- that is, as long as the incumbents are able to exploit and enjoy the benefits of monopolism -- the ILEC will have the incentive and the ability to prevent entry or impede competing carriers from using its local exchange network efficiently. ILECs effectively have a captive market: competitors cannot move large volumes of traffic to other networks, because such effective wholesale alternatives do not exist.

The only way to alter this behavior, or potential behavior, is to change the market structure within which the incumbent operates, thereby modifying the incumbent's incentives. Only if incumbents have the appropriate incentives to act in a procompetitive manner will competitive local markets be created. This cannot happen for wholesale network elements, however, until competing wholesale alternatives exist. Accordingly, the Commission's standard for determining when an unbundling obligation for a particular element should be eliminated is when there is an actual functioning wholesale market for that element.

Before a competitive wholesale market can evolve, there must be at least two fundamental developments. First, external elements -- those not provided by the ILEC -- must be capable of being used interchangeably and seamlessly with the incumbent's UNE in the provision of services to the end user. That is, if combining ILEC and non-ILEC functionalities into a single service offering would corrupt the service -- such as, for example, causing higher costs, lower quality, or service delays -- then the wholesale market is not fully competitive. Second, there must be evidence of wholesale competition. Specifically, there must be demonstrable proof that multiple wholesale providers are holding themselves out to carriers as wholesale providers, and, further, that sufficient excess capacity exists in their networks to replace the ILECs' provisioning of wholesale elements.

After wholesale alternatives develop, C&W USA expects that the dynamics of competition will change dramatically. For example, the long distance market has witnessed the creation of a vibrant wholesale marketplace as a result of the establishment of both nationwide and regional backbone networks. The Commission has credited that wholesale market as being "*a major reason* for the increased competition in the long distance services market."[18] Similarly, in the context of the market for local services, the Commission cannot begin to relax its regulations -- and particularly the unbundling obligations at issue in this proceeding -- until comparable wholesale competition develops. Unless and until those circumstances exist, the 1996 Act's goal of multiple entry techniques requires that the ILECs provide UNEs to competitors. It is in furtherance of this goal that the Supreme Court has directed the Commission to reexamine the "necessary" and "impair" standards; accordingly, the agency's application of these standards must be consistent with that goal.

B. "Impairment" Requires That There Be A Material Difference Derived From The Use Of ILEC UNEs As Compared To Externally Supplied Elements.

Before the Supreme Court's *Iowa Utilities Board* decision, the Commission determined that "'impair' means to become worse or diminish in value" and explained that "an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service

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18 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.,* FCC 98-225, ¶ 42 (Sept. 14, 1998) (emphasis added).

the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises."[19] In articulating this standard, the Commission declined to consider in the analysis the availability of an element from a source outside of the ILECs' networks.[20]

The Supreme Court expressed concern that the Commission's explanation of the applicable standard (1) disregarded the availability of outside elements; and (2) equated "impairment" with *any* increased cost or decrease in service quality that results from the failure of a carrier to obtain access to an element, no matter how trivial.[21] On remand, the Commission can address the Court's two concerns directly and without disrupting the procompetitive results sought in the *Local Competition First Report and Order*. With respect to the "impair" standard, C&W USA proposes the following definition:

> A carrier is impaired if a failure to obtain access to a network element would impose a *material* increase in cost, a *material* delay, or would *materially* restrict the number or scope of customer likely to receive the service any requesting carrier seeks to offer. Impairment would arise if, for example, any one of the following applied:
>
> (1) a denial would materially increase the cost to provision, combine, or otherwise utilize a requested network element in connection with other elements of the ILEC's network or the network of an alternative provider,
>
> (2) a denial would cause a requesting carrier to experience a material delay to provision, combine or otherwise utilize a network in connection with other elements of the ILEC's network or the network of an alternative provider, or
>
> (3) a network element exhibits material economies of scale and scope.

19 *Local Competition First Report and Order*, ¶ 285 (quoting Random House College Dictionary).

20 *See Local Competition First Report and Order.*, ¶¶ 283, 286.

21 *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

As discussed below, this rule satisfies both of the concerns raised by the Supreme Court.

1. The Proposed Rule Answers the Court's Concern that Trivial Differences Might Require an Element to be Unbundled.

In determining whether to require unbundled access to a non-proprietary network element under the impairment standard, the Commission must develop, pursuant to the Court's ruling, *some* limiting standard. That is, any increase in cost, or decrease in quality, however slight, resulting from denial of an element, must *not* automatically constitute impairment.[22] C&W USA's proposed definition incorporates a materiality test into the impairment standard that responds to the Court's concern that "trivial" differences in cost would render an ILEC element a UNE. By incorporating a materiality test in the impairment standard, the Commission can ensure that its limiting standard is qualitative, rather than meaningless or insignificant.

Although the materiality standard defies precise quantification, it requires that there be a substantial or identifiable difference between the alternatives such that a requesting carrier would make a rational decision to use the ILEC element instead of another alternative.[23] In the *Local Competition First Report and Order*, the Commission defined "impair" using an ordinary and natural meaning of the word, concluding that "[t]he term 'impair' means 'to make or cause to become worse; diminish in value.'"[24] Rather than discard this approach entirely, C&W USA proposes that the Commission should modify the approach in interpreting the term "impair."

Specifically, C&W USA encourages the Commission to invigor the degree of impairment

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22 *See Iowa Utils. Bd.*, 119 S. Ct. at 734.

23 Any "close calls" should result in the favor of the requesting carrier in order to promote the Act's goal of rapid development of competition.

24 *Local Competition First Report and Order*, ¶ 285, citing Random House College Dictionary 665 (rev. ed. 1984).

required under the standard. In other words, the Commission should continue to interpret "impair" to mean "diminished in value," but should *quantify* that diminishment as "material" as opposed to "trivial." As Justice Souter noted in his dissent, "impairment" is an ambiguous term, which can mean any degree of impact depending on its context.[25] The Commission's responsibility here is to match that degree of impact to the Act's procompetitive objectives. This is not difficult to accomplish. The Commission can respond to the Court's concern by maintaining its common sense definition of impairment, with the addition of a materiality standard.

The Commission reached a similar result when it interpreted the term "impair" in the context of the over-the-air reception provisions of the 1996 Act. There, the impairment concept was given a clear meaning in Section 1.4000 of the Commission's rules governing over-the-air devices ("Rule").[26] This Rule prohibits a restriction, including a homeowners' association rule, that "impairs the installation, maintenance, or use" of various types of antennae "to the extent it so impairs."[27] In this context, a regulation impairs if it: (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation, maintenance, or use; or (3) precludes reception of a signal of acceptable quality.[28]

This impairment standard is analogous to C&W USA's proposed interpretation of the UNE unbundling impairment standard at issue in this proceeding. Here, a carrier is considered impaired if a failure to obtain access to an element would result in a material increase in cost,

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25 *See Iowa Utils. Bd.*, 119 S. Ct. at 739 (Souter, J., dissenting).

26 47 C.F.R. § 1.4000.

27 47 C.F.R. § 1.4000(a)(1).

28 47 C.F.R. § 1.4000(2)(i)-(iii).

material delay in providing service, or material restriction in the number or scope of customers to be served. Similarly, impairment with respect to over-the-air reception devices involves delays, cost increases, or a decrease in quality. Like the concept of reasonableness in the context of over-the-air reception devices, the concept of materiality achieves the provision's objectives without reducing the standard to an absurdity.

2. The Impairment Standard Requires the Consideration of Whether Externally Supplied Elements Are Interchangeable With ILEC Elements.

The impairment standard also addresses the Court's concern that the test should examine alternatives available outside of the ILEC network. These alternative sources include the competitor itself (so-called self-provisioning), other competitors, or non-carrier service providers. For external elements, the Commission must consider how the element will work in connection with other elements provided by the ILEC and must consider material differences in cost, delay, and scope in interconnecting and using the external element with the ILEC network. Essentially, a carrier is impaired *unless* an externally supplied element is fully interchangeable with the ILEC element in all respects, including cost, ability to combine, and scope of deployment. In other words, if the outside alternative is fully "interchangeable" with the ILECs' elements, then -- and only then -- is a requesting carrier not impaired by denial of access to the element.

Notably, interchangeability depends principally on the type of element and the manner in which it operates within a telecommunications network. Interchangeability is not likely to vary greatly as a result of the differing technical qualities of a network from one region to another; instead, it is very much dependent on the way in which ILEC provisioning systems are designed, according to the principles of openness and interoperability. C&W USA would emphasize that the interchangeability concept is entirely consistent with the procompetitive purposes of the 1996 Act. In order to encourage viable long-term competition, underlying networks must be based on open standards, which reduce barriers to entry and encourage innovation. This is evidenced by the current explosion in IP-based networks, which employ open platforms. Significantly, by adopting the interchangeability concept as a guiding principle, the Commission will be facilitating the deployment of open, rather than closed, networks.

In order to achieve interchangeability, the means by which elements are provisioned and connected to each other must eliminate all material differences in cost, time to provision, and functionality between an ILEC network element and a competitive alternative. With respect to cost, interchangeability requires that there be no material increase in development and deployment costs, or material decrease in economies of scale between an ILEC network element and a competitive alternative. Alternative network elements must be accessible without significant modification to the competitive carrier's network and must be priced in a way that does not materially exceed the incumbent's charges. If a carrier's ability to compete is materially diminished as a result of the cost structures associated with the use of alternative network elements, then the impair standard is met.

In addition, there must be no material difference in functionality between the ILEC element and the competitive alternative. If the elements truly are interchangeable, customers will be unable to distinguish between the service offerings that use an alternative network element and those that use an ILEC network element. If customers are able to differentiate based on a material decrease in functionality, then the impair standard is satisfied. Interchangeability also requires that the use of a competitive alternative not result in a material delay in the market introduction of a competitive service offering. That is, if a delay in provisioning adversely affects the competing carrier's service deployment strategy or consumer acceptance of the service, the impair standard is met. In each of these cases the "impair" standard is satisfied and unbundling is required.

C. The "Necessary" Standard

Clearly, the necessary standard is closely related to impairment. In ordinary parlance, asking whether an element is necessary easily can be the converse of asking whether a carrier is harmed or impaired by not having the element. Although the necessary test is distinct, however, from the impairment test, and applies only to *proprietary* elements as discussed below, the two standards are linked in that the concept of materiality and the factors that determine impairment play a role under each standard. Where they differ is only in the type of impairment that need be shown.

C&W USA proposes the following "necessary" standard:

> Access to a network element that has a proprietary component is necessary if a material loss in the functionality of the network element would result without access to its proprietary characteristic and if the requesting carrier's ability to provide the intended service would otherwise be impaired in accordance with paragraph (b) below.

1. Definition of Elements which are "Proprietary in Nature"

Initially, it is important to note that the "necessary" standard is the exception, not the rule: Section 251(d)(2)(A) makes clear that it applies only to elements which are "proprietary in nature."[29] Indeed, the Commission has reached the conclusion that the necessary standard applies only to proprietary elements, and the Court's decision does not alter this conclusion in

[29] 47 U.S.C. § 251(d)(2)(A).

any way.[30] Thus, for non-proprietary elements, the only standard that is relevant is the impairment standard.

In its *Local Competition First Report and Order*, the Commission defined elements which are "proprietary in nature" as those "with proprietary protocols" or "containing proprietary information."[31] Despite the Court's silence on the issue of the Commission's interpretation of the term "proprietary," the agency now seeks comment on the meaning of "proprietary."[32]

As a starting point, C&W USA urges the Commission to adopt a presumption that any functionality that is subject to accepted industry standards cannot be proprietary, regardless of how the ILEC chooses to provide the element. In that regard, C&W USA agrees that ILEC signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary because they use industry-wide, as opposed to ILEC-specific, protocols.[33] Similarly, network elements should be considered non-proprietary if the interfaces, features, and capabilities sought by the requesting carrier are defined by recognized industry standard-setting entities, are established by Telcordia, or are otherwise available from other vendors.[34]

In the event that an element does not fall within this presumption, C&W USA submits that the "proprietary" standard should be construed narrowly and in such a way as not to create incentives for the ILECs to litigate classification or otherwise raise questionable claims of a proprietary nature. This Commission must guard against potential ILEC attempts to claim

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30 *See Second FNPRM*, ¶ 19; *see also Iowa Utils. Bd.*, 119 S. Ct. at 734-36; *Iowa Util. Bd.*, 120 F.3d at 811, n.31; *Local Competition First Report and Order*, ¶¶ 277-88.

31 *Local Competition First Report and Order*, ¶ 282.

32 *See Second FNPRM*, ¶ 15.

33 *See Local Competition First Report and Order*, ¶ 481.

34 *See Second FNPRM*, ¶15.

proprietary status simply as a delaying tactic or in order to escape their unbundling obligations. Unless the term is defined in such as way as to make it the exception, not the rule, litigation over whether elements are "proprietary in nature" will be inevitable and interminable.

Accordingly, C&W USA proposes that the Commission limit elements which are "proprietary in nature" to those that disclose customer-specific information other than that which a carrier would receive as a corollary to the carrier-customer relationship, or those that disclose a method or procedure protected by the ILECs' own intellectual property rights. Specifically, C&W USA proposes that elements which are "proprietary in nature" be defined as follows:

> A network element may be considered to be proprietary if the elements:
>
> (i) disclose customer-specific information other than that which a carrier would receive from the carrier-customer relationship; or
>
> (ii) disclose a method or procedure protected by the ILEC's own intellectual property rights.

It is important to note that simply receiving the benefit of a new process is not sufficient under part (ii) of the proposed definition to classify the element as proprietary. Under the statute, the purchaser of the UNE, though use of the element, actually must receive an unfair advantage as a direct result of the disclosure of the element's proprietary process or method. In other words, the necessary standard should apply only when proprietary aspects of an element *must be disclosed* when it is unbundled. If unbundling an element will reveal a proprietary methodology or process that can be protected by patent, copyright, or trade secrecy laws, only then should it be considered proprietary. Again, the difference here is between merely obtaining the benefit of a proprietary methodology and revealing the methodology itself. In the latter case, the element is proprietary and the application of the necessary standard is appropriate.

2. The Definition of "Necessary"

In the rare circumstances where an element is "proprietary in nature," C&W USA submits that "necessary" should be defined essentially as "impairment, plus." That is, necessary should be interpreted to mean that (1) the purchaser of the UNE will be impaired (the same impairment standard as discussed above) by a lack of access; *plus* (2) the UNE will experience a material loss in functionality without the element that is claimed to be proprietary.

C&W USA's proposed definition is consistent with the FCC's interpretation of the term "necessary" in other, related contexts. In the *Local Competition First Report and Order*, for example, the Commission examined the Section 251(c)(6) collocation equipment requirement and the meaning of the word necessary. In so doing, the Commission adopted an expansive reading of the term. The Commission concluded that ILECs are required to permit the collocation of equipment *used* for interconnection or access to UNEs.[35] This interpretation of necessary -- "used" or "useful" as opposed to "indispensable" -- is a broad interpretation that the Commission believed most likely would promote fair competition consistent with the purposes of the Act.[36] With respect to Section 251(c)(6), the Commission noted that a strict definition of necessary could allow ILECs to avoid collocating certain equipment, thus undermining the procompetitive purposes of the Act.

Congressional use of the same term in Section 251(d)(2) should be given the same interpretation. The Commission has interpreted "necessary" to mean a prerequisite to competition, such that without access to certain proprietary elements, the ability of competitors

[35] *Local Competition First Report and Order*, ¶ 579.

[36] *See id.*

to compete would be significantly impaired or thwarted.[37] C&W USA believes that it is reasonable to interpret both “necessary” and “impair” using common-sense definitions and in a manner sufficiently broad to promote UNE competition as envisioned in the Act.

D. The Meaning Of Section 251(D)(2)’s Instruction To “Consider” These Factors

The Commission has sought comment on what weight the Commission should attach to the “necessary” and “impair” requirements of Section 251(d)(2).[38] The Commission also has sought comment on whether factors other than the "necessary" or "impair" standards should be considered in determining whether a particular network element should be unbundled, and, further, whether any of these factors should be given weight enough to require the unbundling of an element even if the "necessary" or "impair" standards are not met.[39] C&W USA submits that the "necessary" and "impair" standards are not exclusive and binding: the Commission has the discretionary authority to consider other factors -- such as the promotion of specific important statutory goals -- that may require the unbundling of a network element even if the "necessary" or "impair" standards are not satisfied. In addition, C&W USA would emphasize that the agency always must be guided by the Act’s paramount goal: the development and furtherance of competition.

Section 251(d)(2) states that the Commission shall “consider, at a minimum,” whether access is necessary or whether lack of access would impair a requesting carrier’s ability to

37 *See Local Competition First Report and Order*, ¶ 282.

38 *See Second FNPRM*, ¶ 29.

39 *See id.*, ¶ 30.

provide service.[40] As the Commission points out in the *Second FNPRM*, the requirement that the agency "consider" a particular factor means only that the Commission must "reach an express and considered conclusion" about that factor's importance;[41] the agency is not required to give that factor "any specific weight."[42] However, consistent with the Supreme Court's decision, the Commission also must ensure that its "consideration" gives sufficient "substance" to the "necessary" and "impair" requirements.[43] C&W USA suggests that the Court's concerns about the substance of the "necessary" and "impair" requirements would be addressed fully if satisfaction of the standard results in an absolute presumption that the network element will be made available on an unbundled basis.

However, while satisfaction of the standard should result in an absolute presumption that the UNE will be made available, *failure* to meet the "necessary" and "impair" requirements should not be considered equally dispositive. Section 251(d)(2) requires the Commission to consider, "at a minimum" -- or "at least" -- the "necessary" and "impair" standards: Section 251(d) "does not restrict the factors" that the Commission may consider.[44] Further, as noted above, the FCC is not required to give satisfaction (or not) of the "necessary" and "impair" standards any "specific weight," or, indeed, any weight at all.[45] Accordingly, it is clear that a determination that the unbundling of an element does not satisfy the "necessary" and "impair" standards need not necessarily end the analysis. Pursuant to Section 251(d)(2), the Commission

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40 47 U.S.C. § 251(d)(2)(A),(B).

41 *Second FNPRM*, ¶ 29.

42 *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995).

43 *Second FNPRM*, ¶ 29; *Iowa Utils. Bd.*, 119 S. Ct. at 735.

44 *Central Vermont Ry., Inc. v. FCC*, 711 F.2d 331, 335 (D.C. Cir. 1983).

45 *Time Warner*, 56 F.3d at 175.

has the authority, after it has concluded its initial consideration and determined that a UNE does not meet the test, to expand its consideration to include other various factors.

Specifically, C&W USA respectfully submits that the Commission in its discretion may choose to require that a network element be made available on an unbundled basis in order to advance certain important goals of the 1996 Act other than the promotion of local competition through Section 251. For example, the FCC should, indeed, must be ready, if necessary, to use its discretionary to require the provision of UNEs in order to promote the development and deployment of advanced services. Or, it could become advisable for the Commission to require the provision of UNEs to further the 1996 Act's express mandate of ensuring the promotion of universal service. Importantly, C&W USA is not suggesting that the Commission's discretionary authority to require the provision of a UNE outside of the context of Section 251 is unlimited, or that it should be exercised lightly. However, in some instances, specific statutory mandates of the 1996 Act may only be furthered by the Commission's discretionary implementation of the Act's network element unbundling obligations; the Commission should be ready to do so.

E. Methodology For Applying The Standards

Evaluation of impairment on a central office-by-central office basis is equivalent to ceding competition behind the Iron Curtain of ILEC litigation and delay. The only guaranteed result of such a procedure is that the costs of entering local markets will skyrocket, and carriers will be materially delayed in entering the local market. In order to avoid such a severe impediment to the Act's goals of the rapid introduction of competition, C&W USA recommends that the Commission adopt a uniform, national list of UNEs that will be available everywhere. In addition, in order to promote widespread competition, the Commission should evaluate impairment (or necessity, if an element is found to be proprietary in nature) based on the circumstances facing a typical carrier seeking to enter a local market with a strategy based on UNEs. By applying the standard to the type of entity most in need of UNEs to enter a market, the Commission will create a foundation that will support the broadest possible array of carriers competing to provide service to end users, and also promote the goal of universal availability of telecommunications services. Further, because Section 252(i) permits any other requesting carrier to obtain any interconnection, service, or network element provided to this paradigmatic carrier, a uniform rule based on such carrier will avoid unnecessary arbitrations and other litigation.

1. Uniform National Rules Are Needed to Achieve Section 251's Goals.

In the *Second FNPRM*, the Commission tentatively concluded that it "should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis."[46] The Commission should adopt this tentative conclusion and establish nationwide unbundling rules. Such nationwide rules would be consistent with the 1996 Act and with the Commission's Local Competition proceedings from their inception, and would serve the "national policy framework" goal that underlies both. Only by adopting nationwide unbundling rules can the Commission fulfill the primary role assigned it in Section 251.

In the *Local Competition First Report and Order*, the Commission determined that it could find no justification for allowing access to a technically feasible UNE in one state but not another, in part because it recognized the need for nationwide rules as a source of consistency for both incumbents and competitors. The Commission also recognized that nationwide unbundling

[46] *Second FNPRM*, ¶ 14.

rules serve to equalize the bargaining positions of interconnecting parties, particularly because many CLECs seek to enter nationwide or regional markets. It also noted that uniform nationwide rules would avoid duplicative -- and wasteful -- litigation over the same issues in dozens of jurisdictions and would reduce the administrative burdens placed on state commissions by facilitating more efficient arbitrations.

Furthermore, the *Second FNPRM* makes clear that nothing in the Supreme Court's *Iowa Utilities Board* decision obligates the Commission to question its initial decision to adopt nationwide unbundling rules. Indeed, that decision reinforced the Commission's power to establish such rules by affirming the Commission's statutory authority to adopt nationwide rules designed to implement Section 251, including rules regarding access to UNEs. The Court acknowledged that the 1996 Act extended the reach of the Communications Act into issues previously addressed exclusively on a state-by-state basis, noting that, with respect to matters addressed in the 1996 Act, Congress had "unquestionably" shifted regulation from the state to the federal level.[47] Indeed, Section 251(d)(2) specifically directs the Commission to establish a list of UNEs; the Commission could not fulfill this primary role by ceding control over the list to the states. The Court also affirmed that nationwide standards issued by the Commission are consistent with Section 251(d)(3), by recognizing that state regulation of the local interconnection issues addressed by the 1996 Act must be consistent with the nationwide rules. Accordingly, the Commission clearly has authority under the Act to adopt nationwide rules regarding access to UNEs.

The Commission recently exercised such authority to issue nationwide rules regarding

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[47] *Iowa Utils. Bd.*, 119 S. Ct. at 730, n.6.

another important component of local competition. In the *Advanced Services First R&O* the Commission concluded that nationwide rules are necessary to remove barriers to entry and to accelerate the provision of advanced services.[48] Such nationwide rules facilitate consistent and market-based business planning. The reasoning that supports nationwide collocation rules for advanced services applies with equal force to nationwide unbundling rules.

The *Advanced Services First R&O Order* also embodies a "best practices" approach to implementing local competition that truly maximizes the benefit of extraordinarily effective state commission policies. The nationwide collocation rules are based on a number of innovative regulations adopted by state commissions after developing factual records of the rules' practical procompetitive effects. By implementing these rules on a nationwide basis, the Commission has efficiently spread the procompetitive benefit of these regulations to markets throughout the country. As a result, no consumers in any one state will be forced to accept the status quo while their neighbors enjoy the enhanced service quality, wider range of competitive choices, and technological innovations that competition brings. This "best practices" feature of nationwide rules will prove crucial as the local competition rules continue to evolve in the context of technological, regulatory, and economic change. Such a centralized "clearinghouse of good ideas" also avoids the inherent delays and duplicative expenditure of resources that would result from a state-by-state adoption of the same regulation.

As the Commission noted in the *Local Competition First Report and Order*, the *Advanced Services First Report and Order*, and the *Second FNPRM*, nationwide unbundling rules greatly reduce the massive barriers to entry in local telephone markets. Such rules allow

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48 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket 98-147

(continued…)

CLECs to avoid having to develop multiple network configurations and marketing strategies that are dependant on a particular state's list of available UNEs. With a nationwide UNE list, competitors can formulate a single business plan that relies on access to one or more of those UNEs, knowing that the plan can be implemented in a number of markets. As a result, at least one crucial business decision -- which markets to enter -- would be competitively motivated rather than determined by regulation. The alternative, a geographic patchwork of access to varying lists of UNEs, could require carriers to revise, if not entirely reformulate, their business plan dozens of times. In addition, the absence of a minimum nationwide list of UNEs would be disproportionately disruptive both to smaller CLECs *and to ILECs*, which would lose the economies of scale provided by a uniform set of nationwide rules.

As a national provider of telecommunications and Internet-based services, any local strategy C&W USA adopts must, at least in part, build off its existing customer base. Because C&W USA's customers are geographically dispersed, its entry strategy cannot rationally be contained to a central office-by-central office approach. Rather, C&W USA must be able to market to and serve customers in multiple locations all around the country, particularly those customers, such as many medium and large business customers, that maintain offices in more than one location. Without national rules, C&W USA would be unable to develop such a strategy: unbundling rules that vary state by state would not allow C&W USA to expand its existing customer base in an efficient and cost-effective manner. Because the incumbent retains distinct advantages due to its economies of scale, connectivity, and density, competitive entry based on a variety of local strategies, rather than one national strategy, would prove unworkable.

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(rel. Mar. 31, 1999) ("*Advanced Services First R&O*"), ¶ 23.

A nationwide list of UNEs also would provide financial markets, and the carriers accessing them, with greater confidence in their ability to evaluate business opportunities in the local telephone market. CLECs could seek investment more efficiently by presenting financial markets with a single, focused business plan capable of being implemented on either a regional or national scale. Moreover, nationwide rules would aid potential investors to the extent that they would be required to evaluate only a single business plan. This additional security provided to potential investors is crucial to CLECs because entry into the local market through the use of UNEs often requires access to substantial capital. Thus, the certainty and efficiency provided by nationwide unbundling rules would spur additional investment in local telephone competition.

In addition, a nationwide list of UNEs dramatically reduces the resources that must be expended and the delays that must be incurred to resolve the unnecessary litigation that inevitably will arise from identifying a list of UNEs that must be available. State arbitrations, including the implementation of arbitration awards, already represent a substantial expense for many CLECs attempting to interconnect with the ILECs. Moreover, state-by-state unbundling rules also would create the possibility of multiple independent court proceedings on appeal from state rules. Such litigation strains the resources of CLECs and the smaller ILECs, as well as the courts and agencies where it is conducted.

As in the *Advanced Services First Report and Order*, the Commission determined in the *Second FNPRM* that state commissions would have the ability to add to the nationwide list of UNEs that must be made available, pursuant to the Commission's criteria adopted in this proceeding.[49] The Commission has made clear that its list would form only a *minimum* of those

[49] *See Second FNPRM*, ¶ 14.

UNEs that must be unbundled. However, allowing states to rule on whether a particular element must be unbundled in the first instance would be inconsistent with the adoption of nationwide unbundling rules and would greatly diminish the value of such rules. The Commission repeatedly has embraced the benefits of nationwide rules and it alone should issue the minimum list of UNEs that must be made available. As discussed below, the role of the states should be of greater substance with regard to the *removal* of specific UNEs from the nationwide list.

2. Characteristics of the Paradigmatic Carrier

Section 251(c)(3) permits "any requesting carrier" to obtain access to network elements, on a nondiscriminatory basis, "for the provision of a telecommunications service."[50] In addition, the Act permits requesting carriers to combine network elements with each other "in order to provide [any] telecommunications service."[51] The Commission further has determined that requesting carriers need not have *any* facilities of their own: the Act permits them to provide service exclusively through the use of ILEC UNEs.[52] Indeed, in upholding the FCC's so-called "all elements" rule, the Supreme Court expressly rejected a facilities-based requirement for the use of UNEs. The Court explained:

> [W]e think that the Commission reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in § 251(c)(3) that incumbents provide access to 'any' requesting carrier.[53]

By making network elements available to "any" requesting carrier, and by declining to impose a

50 47 U.S.C. § 251(c)(3).

51 *Id.*

52 *See Local Competition First Report and Order*, ¶ 328.

53 *Iowa Utils. Bd.*, 119 S. Ct. at 736.

facilities-based requirement on UNE availability, Section 251(c)(3) broadens the pool of potential competitors that may enter local service markets, and as a result, *all* telecommunications markets.[54]

In determining whether to require an incumbent to unbundled a network element, the Commission must, as directed by the Act, examine whether "the carrier seeking access" -- or the "requesting carrier" -- would be impaired absent such access to the unbundled element in its ability to provide service. C&W USA submits that, in order to make a meaningful examination of whether the impair standard is satisfied with respect to a particular element, the Commission should base its analysis on whether a specific type of "requesting carrier" would be impaired: Specifically, the Commission should evaluate impairment from the perspective of the type of requesting carrier for which Congress created the UNE requirement -- the new entrant. The Commission should assume that, as contemplated by Section 251(c)(3), this paradigmatic requesting carrier plans to provide local services throughout the United States, to all types of customers, in all types of geographic markets. By ensuring that UNEs are available for this type of requesting carrier, the Commission will promote the rapid entry into the local markets by as many carriers as possible, thereby furthering the procompetitive goals of the 1996 Act.

II. THE OBJECTIVES OF THE ACT REQUIRE RETENTION OF THE UNES DEFINED IN RULE 319 AND THE ESTABLISHMENT OF ADDITIONAL UNES CRITICAL TO THE PROVISIONING OF DATA SERVICES.

In analyzing which UNEs should be made available, it is helpful to understand the relationship that each piece of a network has to other elements. In a functional sense, the

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54 *Local Competition First Report and Order*, ¶ 4 (local competition "is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing providers to enter all markets").

network can be viewed as a series of rings. Those elements at the center of the ring are used by every other network functionality and are the most difficult to replace with external elements. This central "ring" is embodied by all types of elements used to provide connectivity to the customer premises, whether the connectivity is used for traditional voice services or for data and other purposes. The outermost elements of the rings are add-on or optional functionalities, such as operator services or calling card platforms. These elements theoretically will be the easiest to replace, but, today, are as essential to the development of competitive markets as the core elements. Between these are additional rings, first (moving from the core) elements used for multiplexing and aggregation, then elements used for routing and switching, and, finally, elements used for networking between equipment and points of interface and elements used for signaling.

Critically, each ring works in conjunction with the rings inside and outside of it, and the difficulty in substituting other elements increases as one moves inward toward the core. That is, because the ILEC network is a network of elements, the Commission must view each element not in a vacuum, but in relation to each of the others. Without connectivity and interchangeability, the ubiquitous availability of a particular element is inconsequential. In other words, the agency cannot merely consider whether substitutes for an ILEC UNE are available, but, rather, whether any substitutes can work as well as the ILEC UNE when used in combination with the incumbent's network. Thus, the Commission must incorporate these concepts into its unbundling analysis and recognize these interrelationships, whether examining a proposed UNE originally on the list or one only now being proposed.

C&W USA's discussion of the specific UNEs to be unbundled is organized around this concept. Provision of each and every one of these elements on an unbundled basis satisfies the "impair" standard.[55] First, it is clear that failure to obtain access to these elements on an unbundled basis would result in a material increase in cost in the competitor's ability to provide comparable services. With regard to some of these elements -- in particular, the local loop, elements providing multiplexing and aggregation capabilities, and other elements close to the center of the elemental ring -- there simply are no alternative sources, and, unless competitors are required to make the prohibitive expenditures necessary to construct new facilities, local competition simply will not develop. For other elements -- such as those providing vertical features or add-on functionalities, like directory assistance or operator services -- alternative sources may be available. However, any "alternative sources" that might be available will not be of a quality comparable to ILEC provisioned facilities or functionalities and will prevent new entrants from competing on an equal basis.[56]

Where a new entrant cannot offer or provide services that are of a quality comparable to that of the incumbent, at a similar cost and timeliness, the competitor is materially impaired in its ability to compete. Thus, without access to the elements identified below, competitors would be required to invest immediately in duplicative facilities in order to compete for customers. This would involve a tremendous initial investment in facilities before having a customer base large enough to justify an expenditure of the required magnitude, which increases the risks of entry exponentially. Where the new entrant can purchase unbundled elements from the incumbent, the

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55 Application of the "impair" standard to the connectivity UNEs ends the analysis for purposes of Section 251(d)(2)(A). In the *Local Competition First Report and Order* the Commission concluded that loop elements, in general, are not proprietary in nature, and hence the "necessary" standard need not be applied. *See Local Competition First Report and Order,* ¶ 388.

56 *See, e.g., Local Competition First Report and Order,* ¶ 482 (ILEC signaling systems must be provided on an unbundled basis because alternative signaling methods "would provide

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competitor has the ability to build facilities gradually, in a less capital intensive manner, and may strategically deploy the loops to its target customers in a more efficient and economical way. Further, and significantly, ability to purchase these elements from the incumbent will enable the competitor to use the capital that otherwise would have been allocated to new construction in a more efficient and worthwhile way.

Finally, given the costs and other burdens of new construction of local facilities and the corresponding delays in, or downright obstacles to, entry into the local market, the number and scope of customers that will receive new, competitive services by definition will be materially restricted unless new entrants have access to these network elements. Moreover, even where new entrants would have the incentive and the wherewithal to construct new facilities, the competitive realities of their situation would result in their targeting only certain limited categories of customers. Accordingly, competition would develop only with respect to high volume users (such as businesses) or to premises with multiple customers (either business or residential), thereby enabling new entrants to maximize the profits from their investments.

The current market position of C&W USA itself tellingly illustrates the importance of competitive access to these ILEC UNEs, and, correspondingly, the material delays to entry and diminishment of consumer choice that *will* occur if carriers are forced to obtain -- or try to obtain -- alternative access to essential network elements. C&W USA announced just last month a plan to invest $700 million over a three-year period to upgrade, enhance, and expand its Internet backbone network in order to maintain its status as a preeminent provider of Internet services. Importantly, the funds available to accomplish this important business plan are limited, and

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a lower quality of service," and hence would impair competitor's ability to provide

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C&W USA's plans depend in part on access to ILEC UNEs.

If, however, C&W USA is forced to construct new facilities in connection with this project, rather than expanding its network by purchasing UNEs, a large majority of the available funds necessarily will go to construction of loops, switches, and other essential network facilities, and C&W USA will be forced to scale back its plan. Accordingly, C&W USA's ability to invest in the necessary facilities to provide a wholly owned end-to-end service to its customers is extremely limited, if not impossible, without access to UNEs: C&W USA would be materially and substantially delayed in entering some markets, and could be precluded entirely from entering other markets. This result is flatly contrary to the procompetitive mandates of the 1996 Act. The Commission must be careful to ensure that the UNE scheme it adopts in this proceeding will not discourage or prevent providers such as C&W USA from expanding and upgrading its networks and increasing service options for U.S. consumers.

A. UNEs Providing Connectivity To Customer Premises

The elements used by incumbents to provide connectivity to customer premises are at the core of the economies unique to the ILECs, and are perhaps the most important remnant of their positions as monopolists. No other providers have ubiquitous loops to every customer premises in the nation; no other providers can replicate local loops to customers (except for only a few customers generally within high-density business districts). Indeed, rather than try to replicate the facilities used by the incumbents to connect to their customers' premises, hopeful competitors instead generally have chosen to take the route of buying or merging with local

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service).

incumbents, or, for example, in the case of AT&T, of purchasing the only currently available alternative to the ILEC loops -- the cable facilities that also pass customer premises. Of course, only a very few competitors have the resources to enter the local markets by this technique. Most new entrants must rely on provision of these essential elements by the incumbents, pursuant to Section 251(c) of the 1996 Act.

Unbundled access to connectivity UNEs, then -- and, particularly, to the local loops -- is crucial to the development of competition in the local markets. Accordingly, C&W USA submits that connectivity UNEs should include the local loops, as currently identified in Section 319. Further, however, the Commission should modify the existing local loop definition in order to promote and enhance competition in the advanced services market, by including clean copper loops, high capacity loops (DS1, DS3, OC3, OC12, OC48), and, importantly, dark fiber.

Further, C&W USA urges the Commission to clarify that the local loop includes the network interface device ("NID"). For practical purposes, the NID effectively is a component of the local loop -- they are routinely connected elsewhere in the incumbent's network -- and should be provisioned accordingly. Indeed, in the *Local Competition First Report and Order* the Commission expressly included the NID in its discussion of the loop.[57] Accordingly, C&W USA submits that the Commission should ensure that when the incumbent provides the unbundled loop, the NID must be provisioned in an integrated manner with the loop, unless the requesting carrier competitor directs that the NID need not be provided by the incumbent. In addition, C&W USA urges the Commission to clarify that access to the NID element includes unrestricted access to the customer side of the NID -- that is, ILEC-owned inside wire. It is

[57] *Local Competition First Report and Order*, ¶¶ 392-96.

becoming increasingly apparent, in C&W USA's experience, that the access to wire within customer premises -- particularly multiple dwelling units -- is a barrier to entry into the local market.

B. UNEs Providing Multiplexing And Aggregation Capabilities

Second to the connectivity elements in importance are the elements that provide the ability to multiplex or aggregate traffic originating from individual loops. These facilities represent the most efficient and effective means of carrying traffic to the central office and beyond, and, like the loop elements identified above, are crucial to a carrier's ability to provide competitive advanced broadband voice, video, and data services. The multiplexing facilities and functionalities that should be defined as UNEs include, but are not necessarily limited to, integrated digital loop carriers and digital subscriber line access multiplexers.

Multiplexing performs critical network functions that allow carriers to combine elements efficiently, by converting signals and aggregating, disaggregating, and routing traffic. Multiplexing, for example, is necessary for carriers to aggregate loops onto high capacity transport. Significantly, there essentially are no competitive wholesale alternatives to ILEC provision of multiplexing functionalities, which leaves self-provisioning as the only option available to competitors if these elements are not unbundled. Critically, self-provisioning would necessitate massive capital expenditures on equipment and collocation, which many carriers simply cannot support. For C&W USA, in particular, with its geographically diverse customer base, self-provisioning of multiplexing and routing elements would be prohibitively expensive. Moreover, it is C&W USA's experience that efforts to self-provision even in the limited circumstances where it might be economically justified are routinely thwarted and delayed by incumbents. For all of these reasons, competitors that do not have access to unbundled ILEC multiplexing and aggregation elements effectively would be forced to forgo offering certain services and entering certain markets, and end-user customers would be left with fewer service choices.

C. UNEs Providing Routing And Switching

Routing and switching functions are those elements necessary to direct the various types of traffic from the local loop to its ultimate destination. These elements include local and tandem switching capability, as currently defined in Section 319, as well as associated switch-based capabilities and features such as customized call routing functions and related databases.

Access to unbundled switching elements is particularly critical for competitors such as C&W USA which have a geographically dispersed customer base; lack of access to these elements would both materially increase the cost of, and materially delay, the competitor's entry into the local markets. First, as the Commission acknowledged in the *Local Competition First Report and Order*, although each switch does not necessarily carry a high dollar amount, it ordinarily takes at least nine months, and often up to two years, to actually make the purchase and install the switch.[58] For C&W USA, with its widespread customer base, this would involve the purchase and installation of *multiple* switches over a *substantial* period of time, thereby exponentially increasing the burdens of self-provisioning of this element. Further, competitors such as C&W USA would be forced to bear the additional costs of collocating equipment in each and every end office in a region where a customer is located, even if it were able to use its own switches exclusively. In sum, at this time there simply are no viable alternatives to ILEC provision of unbundled routing and switching elements.

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[58] *Local Competition First Report and Order*, ¶ 411.

In addition, C&W USA submits that is essential for the timely development and deployment of advanced services that incumbents be required to make packet switches available on an unbundled basis. In its *Advanced Services First R&O* the Commission recognized that, in order to fulfill the mandate of Section 706, it is "critical" that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers."[59] To that end, the Commission reinforced its commitment to "removing barriers to competition" so that competitors are able to compete effectively with incumbents and their affiliates in the provision of advanced services.[60] Although it deferred action on various proposals that would require the unbundling of certain elements for the specific purpose of promoting advanced services, the Commission expressly acknowledged the importance of packet-switched transmission of voice and data services.[61]

D. UNEs Providing Networking Functions

The elements that C&W USA has identified as related to networking functions provide the ability to transport traffic from a central office to switches, tandems, backbone networks, and interconnecting carriers, whether dedicated to a particular customer or carrier, or shared among more than one customer or carrier; generally, the Commission has identified these elements, in part, in Section 319 as interoffice transmission facilities. In addition, essential -- and integral -- to the operation of transport facilities are networking elements such as signaling networks and call-related databases, which facilitate the routing and completion of traffic, and thereby enable

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59 *Advanced Services First R&O*, ¶ 2.

60 *Id.*, ¶ 3.

61 *Id.*, ¶¶ 5, 7.

the effective interconnection of incumbent and competitor networks. Access to unbundled ILEC networking elements, as the Commission has recognized, encourages efficient network architecture deployment and promotes the ability of new entrants -- and well-established competitors seeking to expand their service offerings -- to combine their own facilities with those of the ILEC.

In addition to the existing Section 319 definitions of transport facilities and signaling and related databases, however, C&W USA urges the Commission to identify as networking elements that must be provided on an unbundled basis packet transport facilities and dark fiber transport. This expanded definition of what constitutes a "transport facility" will ensure the continuing development and deployment of advanced services and provide additional transport capacity and options for competitors.

E. UNEs Providing Vertical Features Or Add-On Functionalities

These elements provide the ability to utilize existing infrastructure to provide additional or related functionalities to end users. Although it is probable that these will be among the first elements that may be eliminated from the requirements of Section 251(d)(2), at this time there are no equivalent competitive substitutes for vertical features and add-on functionalities such as operator services and directory assistance. These elements must be truly interchangeable and work on a comparable basis with the other elements discussed above: elements in this category *must* function seamlessly with the other facilities and functionalities provided by incumbents on an unbundled basis, or customers will remain with the incumbent so as to ensure continued receipt of the full package of services they now receive. For these reasons, in the *Local Competition First Report and Order,* the Commission found that unbundled access to the facilities and functionalities used by incumbents to provide operator services and directory assistance is necessary to facilitate competition in the local exchange market.[62]

F. Operations Support Systems

The Commission found in the *Local Competition First Report and Order* that the "massive" operations support systems ("OSS") employed by incumbents, and the information those systems maintain and update to administer telecommunications networks and services, represent a significant and material barrier to entry.[63] It is these systems that determine the speed and efficiency with which incumbents -- and, potentially, competitors -- can market, order, provision, and maintain telecommunications services and facilities. If new entrants cannot perform these basic service functions for customers, they will not be able to entice customers away from the incumbent, and, where they do successfully market to ILEC customers, will lose those customers either because of delay and confusion with regard to the actual changeover from one carrier to the other, or because the competitor cannot provide the support services that customers have come to expect from the incumbent. In sum, OSS must continue to be a separate UNE, in that it is an indispensable component to the effective functioning of a wholesale market: without access to ILEC OSS, incumbents could make it prohibitively difficult for competitors to use both UNEs and resold services, which, clearly, would severely and materially impair their ability to compete.

C&W USA believes that the current definition of the OSS functions that must be unbundled is appropriate, as a bare minimum. That is, the Commission must require ILECs to provide unbundled access to the pre-ordering, ordering, provisioning, maintenance and repair,

62 *See Local Competition First Report and Order*, ¶ 534.

63 *Local Competition First Report and Order*, ¶ 516.

and billing functions supported by the incumbent's databases and information. However, C&W USA submits that, in recognition of the fundamental centrality of OSS functions to a new entrant's ability to compete, the agency should enhance the OSS standards, and include a full operations testing requirement and anti-backsliding performance measurements for incumbents.

G. Combinations Of UNEs Also Satisfy The "Impairment" Standard And Should Be Mandated.

The Commission's authority to require incumbents to provide nondiscriminatory access to combinations of network elements was affirmed by the Supreme Court in its Iowa Utilities Board decision. The Court reversed the Eighth Circuit's invalidation of Commission Rule 315(b), which prevents incumbents from separating preexisting combinations of UNEs. The Court agreed that "[i]t is true that Rule 315(b) could allow entrants access to an entire preassembled network,"[64] thereby confirming that a preassembled network -- that is, combinations of elements -- must be made available. Moreover, access to combinations was reinforced by the Court's acceptance of the all elements rule: the Court held that "any" carrier, including those without their own facilities, must have access to combinations of UNEs.[65] Accordingly, the Commission clearly has the statutory authority to ensure that incumbent carriers provide nondiscriminatory access to combinations of network elements.

Having already concluded that "[t]he ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications

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64 *Iowa Utils. Bd.*, 119 S. Ct. at 737.

65 *Id.* at 736.

market,"[66] the Commission now must exercise its authority to require, clearly and unequivocally, that the ILECs provide access to UNE combinations, including the UNE platform and the Extended Enhanced Link ("Extended Link" or "EEL"), without restriction. Access to these combinations is particularly important since they allow competitors to access the "last mile" of the network, creating the potential to reach customers at the same broad level the incumbents enjoy. Indeed, the platform and the EEL comprise the only economically reasonable options currently available for securing a reach of that breadth. Accordingly, the platform and the EEL are crucial to the development of competitive local markets, particularly for low-volume customers such as residential and rural users.

The platform will prove critically important to ensuring that all consumers enjoy the fruits of local competition because it facilitates mass market competitive entry, which undoubtedly will bring competitive choice to a greater number of users in a shorter period of time. Such mass market entry is made possible because the platform takes advantage of the efficiencies inherent in preexisting network combinations. Significantly, regional and national competitors will find their multiple market entry strategies dependent on access to the platform. Similarly, the Extended Link also is vital to the development of local competition. It allows switch-based CLECs to provide service to distant customers without having to collocate in each of the central offices serving those customers. As such, CLECs avoid the costs and delays that inevitably plague collocation arrangements with incumbents.

Being able to avoid unnecessary collocation with the incumbents, by utilizing the platform or the Extended Link, would remove a substantial and material financial barrier for

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[66] *Second FNPRM*, ¶ 2.

CLECs seeking access to customers outside the areas in which they are collocated. As noted, without the ability to use combinations, competitors would have little choice but to collocate to obtain access to UNEs. A mandatory collocation regime of this sort would impose unduly burdensome, discriminatory, and wasteful financial burdens on competitors. As the Kentucky Public Service Commission emphasized, "the requirement that a CLEC may combine UNEs only by means of collocation is both discriminatory and unwarranted. The provision violates the Act and must be reformed."[67]

The Commission also must adopt combination rules that will prevent anticompetitive practices by the ILECs once combinations are made available. One such favorite ILEC practice is the addition of unwarranted charges, such as "glue charges," to the cost of combinations. There is no legal, economic, or rational basis for imposing glue charges on competitors. It costs incumbents absolutely nothing to combine UNEs that already are combined, and any charges for the initial installation of UNEs already are represented in nonrecurring charges for those elements. Moreover, ILECs serve their own customers over the platform but do not incur costs for combining elements. Finally, the imposition of recurring glue charges for an alleged one-time event is patently unjust.

Nevertheless, ILECs in a number of states have sought to impose such charges under the guise of "costs" associated with disconnecting and reconnecting UNE combinations. This practice is unnecessary and is no more than an ILEC attempt to impose redundant, wasteful costs on the combinations they have provided -- albeit reluctantly -- to competitors. As the Maryland

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67 *Investigation Regarding Compliance of the Statement of Generally Available Terms of BellSouth Telecommunications, Inc. with Section 251 and Section 252(d) of the Telecommunications Act of 196*, Order, Case No. 98-348, Kentucky Public Service Commission (August 21, 1998) (emphasis added).

Public Service Commission stated,

> [s]uch separation and recombination serves no public purpose and provides no cost benefits. [Bell Atlantic]-MD will also incur additional costs putting these elements back together again in collocation space. These additional and unnecessary costs ultimately would be passed on to the consumer. Furthermore, disassembling network elements will put customers out of service unnecessarily while the disconnection and subsequent reconnections are made.[68]

ILECs must not be allowed to exact any charges for UNE combinations in addition to those cost-based charges that are embedded in the preassembled combinations. The Commission should adopt proactive rules to prevent this extremely inefficient practice and its anticompetitive effects.

Despite the fact that the Commission already adopted rule section 51.309, ILECs repeatedly attempt to impose discriminatory restrictions on the ability of CLECs to access combinations of network elements to use as they see fit in provisioning service.[69] The rule expressly states that incumbents may not impose any "limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."[70] According to the rule, competitors -- not the incumbents -- have the right to determine how a combination will be used to provide service. The ILECs' blatant disregard for this rule compels the Commission to reiterate, and reinforce if

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68 *Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996*, Order, Case No. 8731 -- Phase II(c), Order No. 74671 (Nov. 2, 1998).

69 Incumbents have sought restrictions on the elements available in combinations, the services that could be offered over particular combinations, the customer classes that could be served using a combination, and the geographic area where combinations could be used. *See, e.g.*, *In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services, et al.*, Docket Nos. TX95120631, TO96070519, TO98010035, TO98060343, TX98010010, New Jersey Board of Public Utilities, Bell Atlantic-New Jersey Proposals (Nov. 5, 1998).

70 47 C.F.R. §51.309(a).

necessary, its prohibition on the imposition of anticompetitive restrictions on access to and use of combinations by CLECs. Such restrictions are a serious impediment to the ability of CLECs to use combinations such as the platform or the EEL, and materially impairs their ability to compete with the ILECs in any meaningful way.

In sum, if genuinely competitive local markets are to be realized, the Commission must affirmatively prohibit the ILECs from restricting CLECs' access to and use of UNE combinations. Without such prohibitions, the ILECs will continue to demonstrate a blatant disregard for the Commission's local competition rules, delaying competitive entry by forcing CLECs to litigate additional unreasonable restrictions on combinations. The amount of time, energy, and money that has been squandered in attempts to overcome the stall-through-litigation tactics of the ILECs, which otherwise could have been invested in the competitive local exchange market, is disgraceful. Importantly, it is the end-user consumer that, ultimately, is most harmed by these tactics. For these reasons, Congress and the Commission always have understood the importance of the ILECs' obligation to provide nondiscriminatory access to combinations, but now the Commission also understands how, in practice, the ILECs will seek to evade that obligation by repeatedly restricting such access. It is crucial to the competitive local market that the Commission act to prohibit further ILEC restrictions on combinations and put an end to the seemingly endless litigation they produce.

III. THE COMMISSION SHOULD ESTABLISH ORDERLY PROCEDURES FOR CONSIDERATION OF THE REMOVAL OF UNEs.

Although C&W USA recognizes and hopes that, in the future, a functioning wholesale market may exist for certain elements, C&W USA cautions the Commission about removing any

UNEs from the list at this time. The Act has been in place for three years. While competition is beginning to take hold in certain limited areas, statistics regarding existing ILEC domination tell a clear and compelling story: ILECs continue to have a stranglehold over most of the local customer base. Accordingly, C&W USA urges the Commission to use this proceeding to reaffirm its commitment to implementing the Act's vision of national competition. The use of UNEs is central to the Act's goals of stimulating immediate and viable competition. Any attempt to minimize the use of UNEs at this time would be misguided: such a course of action would not merely cause competition to stagnate, it inevitably would cause a *reversal* in what has been achieved thus far.

The use of UNEs helps to catalyze competition and, just as importantly, helps to erode the advantages in economies of scale, density, and connectivity that ILECs maintain through their continuing monopoly status. The importance of pursuing a commitment to UNEs is as clear and as necessary as the Commission's recently demonstrated commitment to ensuring fair and efficient collocation. The Commission must use these two policies in tandem to break the local bottleneck and realize the Act's goal of creating a truly competitive local market. The Supreme Court has largely reinforced the policies adopted by the Commission in 1996; now that the legal battle essentially is over (at least for now), the Commission should continue along the path it has trailblazed so far, and let its rules break through the barriers that continue to block progress.

A. The Commission Must Retain Sole Authority To Remove Nationwide UNEs From The List.

For the same reasons that state commissions should not be permitted to decide which UNEs must be unbundled in the first place, they must not be permitted unilaterally to remove a UNE from the nationwide list. Clearly, this would nullify the benefits of adopting minimum nationwide rules. These benefits are tied inextricably to the industry's understanding that a list of minimum UNEs *will be uniformly available* pursuant to the Commission's decision in this proceeding. Allowing states to remove UNEs independently would lead inevitably to the Balkanization of the unbundling rules among the states. Even before any state actually removed a UNE from the list, the mere possibility that UNEs *could* be removed on a state-by-state basis would eliminate the certainty and efficiency of nationwide rules. For these reasons, and as discussed below, the Commission must adopt truly nationwide unbundling rules, which include a list of minimum available UNEs that cannot be eroded by state commissions.

B. The Commission Should Adopt An Orderly Procedure For Examining UNEs That Includes Input From State Commissions.

As competition in the local exchange develops, UNEs may no longer need to be included on the minimum nationwide list. The Commission should, therefore, adopt an orderly procedure for removing UNEs from that list. Such a procedure should be analogous to a streamlined version of the Section 271 application process, and should consist of two basic steps. First, an ILEC should petition a state commission for a ruling that specific local circumstances have removed the need for mandatory access to a particular ILEC UNE. The state commission then would develop and consider the record presented by the ILEC before rendering an opinion on the petition, pursuant to the criteria established in this proceeding. Both the ILEC and the state commission must specify the exact geographic locations that are subject to the request, which should be no smaller than the zones the state commission establishes to implement the FCC's geographic deaveraging requirements. It is highly unlikely that the specific circumstances that form the basis of the petition would be present at every relevant point in the ILEC network, and even more unlikely that they would have any validity on a statewide basis. By relying on the zones established for geographic deaveraging, the Commission would further two important goals -- equity and efficiency. First, these zones generally occupy geographic areas that are large enough so that upon removal of a particular UNE from the nationwide list, CLECs are able to make strategic entry decisions based on rational market boundaries, yet are small enough so that ILECs have reasonably foreseeable opportunities to seek removal of particular elements from the nationwide list. Second, because these zones reflect geographic areas that share similar economic characteristics regarding the cost of UNEs (particularly local loops), it is reasonable to assume that the same economic factors affecting entry decisions and the development of wholesale markets for UNEs would be similar throughout one zone.

The second step in the process assumes a favorable state commission opinion on the ILEC petition. The ILEC then would petition the Commission to remove the UNE from the minimum list in those areas approved by the state commission, presenting the state commission's opinion and the record developed. Ultimately, the Commission would render a final decision on whether the UNE should in fact be removed from the nationwide list in specific locations.

C. The Commission Must Provide An Orderly Transition Period For UNEs That Are Removed From The Nationwide List.

After a Commission determination that a particular UNE no longer should be unbundled, that UNE should undergo a "phase out" period, during which it would remain available, in order to avoid market disruption. Competitive users of the UNE must have a minimum period before that UNE becomes unavailable to them to take whatever steps are necessary to continue their provision of service without the UNE. The alternative -- allowing the ILECs to immediately cease unbundling a network element as soon as it is removed from the list -- would put CLECs at a great competitive disadvantage because the ILECs, and their customers, never would face the possibility that a particular UNE that is critical to their business plans could be stripped away without adequate warning and without time to make alternative arrangements.

Such a phase-out period must be sufficient to allow CLECs the practical ability to reconfigure their operations without degrading or disrupting service to their customers, and must take into account the length of time required to obtain alternative network arrangements from the ILECs. However, provisioning intervals have been a significant point of contention among parties and state commissions. Disagreements have arisen with regard to what the appropriate intervals should be, the frequency of missed provisioning intervals, and what the consequences for missed intervals should be. One conclusion is clear: it takes time to configure, order, obtain, and deploy UNEs taken from the ILEC. The Commission should consider these ILEC provisioning intervals to be the minimum time required for CLECs to ensure that they can obtain and implement substitutable service without customer disruption.

It also is crucial that ILECs continue to honor existing interconnection agreements until their expiration. CLECs have invested substantial resources in negotiating, arbitrating, and implementing their current interconnection agreements. They, and their investors, committed these resources with an expectation of reliance on these agreements. As contemplated by the Act, the Commission, and state commissions, CLECs and ILECs have looked primarily to their agreements to arrange their operations. These agreements are complex documents that embody the interconnecting parties' negotiations on a great number of interrelated aspects of their relationship. Both CLECs and ILECs expended the resources to develop these agreements under a regime of a nationwide minimum list of available UNEs that does not currently allow for the removal one or more of those UNEs from the list. It would be patently unfair and a waste of the substantial resources already invested in local competition to allow ILECs to ignore fundamental obligations in their current interconnection agreements. Therefore, the Commission should adopt rules that require ILECs to continue to unbundle, at a minimum, those UNEs identified in their existing agreements.

In addition, all reconfiguration, early termination, and non-recurring charges should not apply to, or should be waived for, CLECs that are forced to transition from a UNE that becomes unavailable as a result of being removed from the nationwide list. After removal from the list, ILEC provision of such a UNE would be left to the discretion of the individual ILEC. If an ILEC voluntarily chooses to cease making that UNE available, it should bear the cost of seeking to change the parties' relationship. CLECs will already be forced to incur the costs of making alternative business and operational arrangements to accommodate the unavailability of the UNE; the CLEC should *not* be forced to pay the additional transition costs for a network change initiated by the ILEC. The Commission's UNE rules must require that ILECs bear the costs of their voluntary network changes.

The rules adopted by the Commission also should grant CLECs a right to petition the Commission for waiver of any determination that access to a particular UNE should no longer be available. Such a right to petition for continued access to the UNE would allow CLECs the opportunity to demonstrate that removal of the UNE under specific conditions or in specific locations is inappropriate. This right would provide an important "backstop" for CLECs before the significant event of actually losing access to a UNE occurs. This procedural right would be particularly important in smaller and rural markets that may be subsumed into locations where UNEs are removed from the nationwide list, but where true competitive alternatives to the UNE may not be sufficiently realized. In such markets, local competition would suffer a disadvantage if CLECs are not allowed to demonstrate unique circumstances that require continued access to a particular UNE.

Finally, the Commission should make clear that ILECs *must* continue to abide by their existing unbundling obligations until a definitive decision has been made by the agency to remove a particular element from the list. The Commission should state explicitly that it will not tolerate any attempts by ILECs to hinder the use of UNEs by CLECs while a petition for removal of a UNE is pending at the state or federal level. The mere act of filing such a petition should create no uncertainty regarding an ILEC's duty to provision UNEs to CLECs. Given the past practices of some ILECs during the pendency of the appeal of the Commission's *Local Competition First Report and Order*, such actions would not be out of the ordinary and should be rejected summarily.

CONCLUSION

For the foregoing reasons, the Commission should act promptly to redefine UNEs in furtherance of the Act's goal of creating and maintaining robust local competition. Further, the agency should interpret the terms "necessary" and "impair" to promote the objectives of lowering entry barriers and encouraging the widespread introduction of competition for end users. Applying these standards, it should define the UNEs described above and mandate their availability on a national basis.

Respectfully submitted,

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